06. S Bielefeld

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Australian Law Reform Commission
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By email: nativetitle@alrc.gov.au

Re: Review of the Native Title Act 1993

I make this submission as a non-Indigenous academic with a disciplinary background in law whose research and teaching focuses on issues of public policy, social justice, human rights and Indigenous peoples.

It is timely that the Australian Law Reform Commission gives consideration to the important issues raised in Issues Paper 45 about the *Native Title Act 1993* (Cth) (NTA). It is important to evaluate whether the NTA is working effectively to rectify the injustice experienced by many Aboriginal and Torres Strait Islander peoples. As the Commission notes, the preamble to the *Native Title Act 1993* (Cth) states that:

> The people of Australia intend:
> (a) to rectify the consequences of past injustices by the special measures contained in this Act ... for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
> (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.[1]

Yet as Tom Calma states, native title 'doesn't result in just outcomes. It has caused pain. It is not what it was held out to be.'[2] This submission will deal with the following issues:

1. Tradition and Continuity
2. The influence of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in policy development in the native title area
3. Whether native title can include interests of a commercial nature

In any evaluation of law and policy affecting Indigenous peoples it is important to consider the scholarship produced by Aboriginal writers on the subject. Therefore this submission draws heavily upon Aboriginal scholarship in evaluating the native title legislation. It also draws upon the work of several other non-Aboriginal scholars who have made a notable contribution to this field.

* The author wishes to acknowledge the helpful comments of Professor Jon Altman on an earlier draft of this submission.

[1] Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper 45 (2014) 18.
[2] Tom Calma, 'Who's Driving the Agenda?' in Lisa Strelein (ed), *Dialogue about Land Justice – Papers from the Native Title Conference* (Aboriginal Studies Press, 2010) 262.

Tradition and Continuity

This part will address whether there should be:

- clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests'
- a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection
- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.[3]

As Aboriginal scholar Jason Behrendt has pointed out, Aboriginal native title claimants have been 'deprived by the application of [E]urocentric legal appraisals of what is "traditional".'[4] This was a key factor in the unsuccessful claim of *Yorta Yorta v State of Victoria*[5] where the Yorta Yorta people were characterised as having 'lost their culture and their status as a "traditional society".'[6] At first instance, Justice Olney held that the 'tide of history'[7] had washed away the necessary Aboriginal connections with the land.[8] Olney J concluded:

> The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival.[9]

This finding provoked the following response from Wayne Atkinson, an Aboriginal native title claimant involved in the litigation:

> Underpinning the events on which this 'tide' rests, is a history of land injustice and flagrant human rights abuses. It is a history sourced in violence and bloodshed over the ownership and control of land, acts of genocide in relation to the forced removal and attempted break-up of Indigenous families, and racist government policies aimed at subjugating and controlling Indigenous people. It is ironic in the extreme, many might say obscene, that the crimes

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[3] Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper 45 (2014) Terms of Reference.

[4] Jason Behrendt, 'Changes to Native Title Since *Mabo*' (2007) 6(26) *Indigenous Law Bulletin* 13, 14. Under s 223(1)(a) of the *Native Title Act 1993* (Cth) native title 'rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'.

[5] *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (Unreported, FC, Olney J, 18 December 1998); [1998] FCA 1606 - the decision at first instance and *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (2001) 180 ALR 655 – the decision at second instance – and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58 – the decision at third instance.

[6] Lisa Strelein, *Compromised Jurisprudence – Native Title cases since Mabo* (Aboriginal Studies Press, 2006) 85.

[7] Quoting Brennan J in *Mabo v Queensland (No 2)*(1992) 175 CLR 1 at 60.

[8] *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (Unreported, FC, Olney J, 18 December 1998); [1998] FCA 1606, [129].

[9] *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (Unreported, FC, Olney J, 18 December 1998); [1998] FCA 1606, [129].

> against humanity, which constitute this "tide", can be invoked by those seeking to deny Indigenous groups their rights to land.[10]

Irene Watson makes a similar point.[11] She describes what Aboriginal people have been given by way of native title as a 'poison[ed] chalice'.[12] In part this is due to the principle of extinguishment. Thus Watson explains that:

> [N]ative title applicants are required to prove the extent to which their nativeness has survived genocide. If nativeness is not proven it is considered extinguished. If it is proven it is open to extinguishment. Native title is extinguishment. Extinguishment is a form of genocide.[13]

In part this is also due to the 'privileging of European sources over the body of Indigenous knowledge'.[14] Indigenous knowledge frequently ends up being subordinated to non-Indigenous knowledge in the native title process. This routinely creates injustice for many Aboriginal people. I submit that Indigenous knowledge about what constitutes traditional Indigenous laws and customs should be given greater prominence in native title determinations.

A significant problem faced by native title claimants is that colonial judges are authorised under colonial law to determine what amounts to the existence of traditional Indigenous laws and whether the claimants have continued to hold native title in accordance with those traditional laws. In the *Yorta Yorta* decision at second instance,[15] the majority of the Federal Court held that although traditional law can survive some evolution it would be considered lost where the practices can no longer 'properly be characterised as "traditional".'[16] However, it is questionable whether colonial judges are qualified to determine what is 'traditional' within Aboriginal culture. The *Yorta Yorta* litigation demonstrates that Eurocentric notions of what 'traditional' means are privileged over Aboriginal tradition itself, thus perpetuating Australia's colonial legacy of racial injustice.[17]

In the *Yorta Yorta* decision European written histories were privileged over the oral testimony of the Indigenous claimants.[18] In the decision at first instance, Justice

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[10] Wayne Atkinson, 'Not One Iota of Land Justice – Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) *Indigenous Law Bulletin* 19, 20.
[11] Irene Watson, 'Settled and Unsettled Spaces: Are We free to Roam' in Aileen Moreton-Robinson (ed), *Sovereign Subjects – Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 15, 24-25.
[12] Irene Watson, 'Settled and Unsettled Spaces: Are We free to Roam' in Aileen Moreton-Robinson (ed), *Sovereign Subjects – Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 15, 25.
[13] Irene Watson, 'Buried Alive' (2002) 13 *Law and Critique* 253, 263.
[14] Wayne Atkinson, 'Not One Iota of Land Justice – Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) *Indigenous Law Bulletin* 19, 21.
[15] *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (2001) 180 ALR 655.
[16] *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (2001) 180 ALR 655, 687; [2001] FCA 45 [74].
[17] Wayne Atkinson, 'Not One Iota of Land Justice – Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) *Indigenous Law Bulletin* 19, 21; Alexander Reilly, 'History Always Repeats - *Members of the Yorta Yorta Aboriginal Community v The State of Victoria*' (2001) 5(6) *Indigenous Law Bulletin* 25, 25.
[18] Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors (Unreported, FC, Olney J, 18 December 1998); [1998] FCA 1606, [106]; Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption – History, Law and Indigenous People* (2008) Chapter Three.

Olney held that '[t]he most credible source of information concerning the traditional laws and customs of the area'[19] was to be found in what James Cockayne describes as 'the amateur anthropological observations of the pastoralist Edward Curr from the 1840s'.[20] This is despite the fact that early colonists were 'notorious for interpreting traditional culture through their own blinkers'.[21] Using Eurocentric sources to determine whether traditional connections to land have been maintained is likely to disadvantage Indigenous claimants,[22] because many early colonists had a vested interest in staking their own claims to land, and had no expertise about Aboriginal culture.

On appeal to the High Court, in the *Yorta Yorta* decision at third instance, it was held by the majority that the 'acknowledgment and observance' of traditional laws and customs 'must have continued substantially uninterrupted' since the commencement of colonisation.[23] They held 'the traditional laws and customs' must constitute 'a system that has had a continuous existence and vitality since sovereignty.'[24] This requirement of 'continuity' is a difficult standard of proof for Indigenous claimants who have undoubtedly faced substantial challenges maintaining such continuity as a result of colonisation.[25] This finding highlights the fact that native title can be hard for Indigenous claimants to prove. The standard of proof is set so high that attaining a successful outcome for many Aboriginal claimants is more onerous than it should be if rectifying injustice is the aim.[26]

In the *Yorta Yorta* decision at third instance, the High Court clarified what they required in terms of continuity as follows:

> In the proposition that acknowledgment and observance must have continued substantially uninterrupted, the qualification 'substantially' is not unimportant. It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult.

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[19] *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (Unreported, FC, Olney J, 18 December 1998); [1998] FCA 1606, [106].

[20] James Cockayne, '*Members of the Yorta Yorta Aboriginal Community v Victoria* – Indigenous and Colonial Traditions in Native Title' (2001) 25(3) *Melbourne University Law Review* 786, 788. Historian Ann McGrath has been critical of the way in which courts have not distinguished amateur from professional history - Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption – History, Law and Indigenous People* (2008) 35.

[21] Wayne Atkinson, 'Not One Iota of Land Justice – Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) *Indigenous Law Bulletin* 19, 21.

[22] Wayne Atkinson, 'Not One Iota of Land Justice – Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) *Indigenous Law Bulletin* 19, 21.

[23] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58 [89] per Gleeson CJ and Gummow and Hayne JJ.

[24] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58 [47] per Gleeson CJ and Gummow and Hayne JJ; Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption – History, Law and Indigenous People* (2008) 66 and 69.

[25] This was acknowledged by the Judges to a degree - *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58 [89]. Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook, 2003) 763. This requirement is reminiscent of the approach taken by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 where he stated that Indigenous connections to land can be washed away by 'the tide of history' and thus native title applicants must demonstrate continued connection to the subject land (at 60).

[26] Michael Dodson, 'Indigenous Culture and Native Title' (1996) 21(1) *Alternative Law Journal* 2, 3-4.

> It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs.[27]

In the *Yorta Yorta* decision at third instance, the High Court made it clear that there needs to be particular type of society for native title claimants to satisfy the legislative criteria in s 223(1) of the NTA:

> To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.[28]

Aboriginal people have criticised the way in which Eurocentric approaches in native title litigation have the power to obliterate Indigenous people's legal entitlements to land.[29] Indeed Eurocentric native title decisions have the power to deny that the claimant Aboriginal group is genuinely an Aboriginal group.[30] Although native title is meant to be 'given its content by the laws and customs of [I]ndigenous peoples and not the other way around,'[31] judicial interpretations of these customs can have an effect of negating them for the purpose of native title claims. Michael Dodson suggests that judges have allowed their perceptions of Aboriginal laws and customs to be the determining factor in native title claims, rather than the actual Aboriginal laws and customs themselves.[32] Jason Behrendt similarly explains that under the native title regime:

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[27] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58 [89].
[28] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58 [50].
[29] Wayne Atkinson, 'Not One Iota of Land Justice – Reflections on the Yorta Yorta Native Title Claim 1994-2001' (2001) 5(6) *Indigenous Law Bulletin* 19, 21.
[30] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) 349.
[31] Michael Dodson, 'Indigenous Culture and Native Title' (1996) 21(1) *Alternative Law Journal* 2, 2.
[32] Michael Dodson, 'Indigenous Culture and Native Title' (1996) 21(1) *Alternative Law Journal* 2, 5.

> Hairs are now split between 'rules having normative content' and 'observable patterns of behaviour.' Aboriginal people can now maintain knowledge of sites and have some laws in relation to them, but such knowledge and laws are the subject of a qualitative assessment whereby the Courts determine the level of knowledge which is sufficient. If they do not carry out ceremonies, or do not know enough dances or ceremonies, they are said to no longer have traditional laws and customs. The legitimacy of the process by which traditional knowledge is transmitted is similarly assessed and judged. … None of these matters seem to be assessed from an Indigenous perspective as to what is sufficient, or what is legitimate. … Key concepts such as 'laws and customs', 'acknowledge and observe', and 'traditional' ought to be understood from the stand-point of Aboriginal people.[33]

In a leading text on Indigenous legal issues, the authors explain that '[t]he essential requirement to emerge from *Yorta Yorta* is the demonstration of *continuity*. That is, continuity of a *society* from sovereignty to the present, continuity in the *observance of law and custom* and continuity in the *content* of that law and custom.'[34] The degree of continuity required by the courts imposes an unreasonably high standard of proof upon Aboriginal claimants given that Australian governments have engaged in concerted efforts to force Aboriginal peoples off their traditional lands and have, via assimilation policies, attempted to destroy Aboriginal culture and the very laws and customs now needed to prove native title. For this reason 'a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection' is appropriate. However, care needs to be taken in developing the criteria by which such a presumption can be rebutted. If the presumption could be rebutted by a lack of 'continuity' as defined by existing case law then native title claimants would be no better off than they are now. Some judges might take an approach that the presumption could be rebutted where there was a lack of 'literal continuity' and others where 'substantial continuity' was absent.[35] The requirement of continuity as articulated in the current case law is inappropriate as a benchmark because of Australia's colonial history. Greater clarity is required about what would suffice to rebut the presumption. Without such clarity there is a danger that Eurocentric approaches may continue to prevail and have a detrimental impact upon native title claimants. Whatever criteria are set in terms of rebutting the presumption it is important that they are not the same sorts of 'unrealistic and culturally insensitive criteria'[36] seen in much of the native title case law to date.[37]

The question as to whether courts should be empowered 'to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so' is an interesting one and worthy of further reflection. However, there are two issues that could arise with this suggested formulation. First, if courts are empowered to

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[33] Jason Behrendt, 'Changes to Native Title Since *Mabo*' (2007) 6(26) *Indigenous Law Bulletin* 13, 14.
[34] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) 348.
[35] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) 349.
[36] Michael Dodson, 'Indigenous Culture and Native Title' (1996) 21(1) *Alternative Law Journal* 2, 2.
[37] For example, the *Yorta Yorta* litigation cited above, *Bodney v Bennel* (2008) 167 FCR 84, 104, *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [812], *Risk v Northern Territory* (2007) 240 ALR 74, [83]. Also see Lisa Strelein, *Compromised Jurisprudence – Native Title cases since Mabo* (Aboriginal Studies Press, 2006).

disregard a disruption in continuity (as opposed to being directed to disregard it) then there may be judges who do not disregard it. That is to say, if left to the discretion of judges as to whether or not they regard or disregard these factors there may well be inconsistent outcomes in native title case law. The judicial interpretation of the NTA is a mixed bag, but there certainly are numerous examples of judges choosing to give effect to interpretations of the NTA that have the impact of reducing rather than enhancing robust native title rights for Indigenous claimants. Would a failure to disregard substantial interruption entitle a native title claimant to an appeal? This is something that needs clarification.

Second, it is not necessarily clear what is meant by 'the interests of justice', as there are different forms of justice, including distributive justice, formal justice, substantive justice, and social justice.[38] I note that the Commission has mentioned that justice requires 'both procedural rights and access to the resources necessary to participate fully in the legal system.'[39] However, I submit that justice needs to be conceptualised more broadly than that, justice is about substantively just outcomes, not just procedural fairness to participate on a basis of formal equality.[40] Yet without a bit more guidance on what type of justice judges are to deliver, they are likely to deliver formal justice rather than substantive justice – which really continues to tip the scales in favour of non-Indigenous interests. The UNDRIP could provide a useful benchmark for conceptualising a more robust conception of justice in the area of native title.[41]

Influence of the UNDRIP in policy development

I note that the terms of reference for the ALRC have been framed having regard to 'Australia's statement of support for the United Nations Declaration on the Rights of Indigenous Peoples'. I also observe that the preamble to the *Native Title Act 1993* (Cth) refers to rectifying past injustice, and the UNDRIP can be useful as a benchmark to measure the government's conduct in regards to this aim. I strongly support the use of the UNDRIP in policy development. The UNDRIP has been used recently by the Parliamentary Joint Committee on Human Rights (PJCHR) in 2013[42] to evaluate the *Stronger Futures* legislative package.[43] The Committee noted that the UNDRIP is 'considered to represent customary international law binding on Australia

[38] Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians – Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal* 522, 525-526; Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 82, Geoffrey Leane, 'Testing Some Theories about Law: Can We Find Substantive Justice within Law's Rules?' (1994) 19 *Melbourne University Law Review* 924, 926–8; Margaret Davies, *Asking the Law Question* (Lawbook, 3rd ed, 2008) 150, 153.

[39] Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper 45 (2014) 62.

[40] Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 82.

[41] Megan Davis, 'Adding a New Dimension – Native Title and the UN Declaration on the Rights of Indigenous Peoples' (2009) 93 *Reform Native Title* 17, 17-19.

[42] Parliamentary Joint Committee on Human Rights (PJCHR), Commonwealth Parliament, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013).

[43] *Stronger Futures in the Northern Territory Act 2012* (Cth); *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth); *Social Security Legislation Amendment Act 2012* (Cth).

in many, though not all, respects.'[44] The Committee stated that 'the Declaration is … an influential and authoritative source of guidance that should be drawn on in policymaking and the development of legislation.'[45] It is therefore appropriate that the UNDRIP be used to guide the development of native title law and policy.

I support the statement of the Aboriginal and Torres Strait Islander Social Justice Commissioner that 'a "principled approach" that involves identifying key principles in the Declaration, and then agreeing on ways in which the principles can give practical guidance on the operation of articles under the Declaration'[46] be undertaken. Megan Davis explains that:

> The Declaration has extensive provisions relating to the recognition and protection of Indigenous lands. … the Declaration represents an important framework from which the Australian state can re-engage Indigenous communities in relation to native title on the basis of internationally recognised and accepted standards pertaining to the rights of Indigenous peoples to land and the recognition of their culture.[47]

Davis contends that 'some international lawyers are now arguing that some of the land articles in the Declaration already constitute emerging customary international law with respect to the rights of Indigenous peoples.'[48] She points to the following Articles of the UNDRIP as useful in the native title area:

> Article 25
> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
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> Article 26
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

[44] Parliamentary Joint Committee on Human Rights (PJCHR), Commonwealth Parliament, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) 15.
[45] Parliamentary Joint Committee on Human Rights (PJCHR), Commonwealth Parliament, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) 16.
[46] Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper 45 (2014) 20.
[47] Megan Davis, 'Adding a New Dimension – Native Title and the UN Declaration on the Rights of Indigenous Peoples' (2009) 93 *Reform Native Title* 17, 17.
[48] Megan Davis, 'Adding a New Dimension – Native Title and the UN Declaration on the Rights of Indigenous Peoples' (2009) 93 *Reform Native Title* 17, 18.

> Article 27
> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
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> Article 28
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Another aspect of the UNDRIP that is relevant to the native title process is Article 8(2)(b) which provides that 'States shall provide effective mechanisms for prevention of, and redress for [a]ny action which has the aim or effect of dispossessing' Indigenous peoples 'of their lands, territories or resources.' This is relevant in terms of the 'piecemeal erosion' of native title that can occur through restrictive judicial interpretations of the NTA.[49]

Yet another part of the UNDRIP to be mindful of is Article 2, which states that: 'Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.' This is relevant in terms of a right to be free from Eurocentric constructions of 'traditional' Aboriginal culture, discussed and critiqued in part 1 of this submission. It is also pertinent in terms of the judicially imposed criteria about 'continuity', which appears to be discriminatory given that so many Aboriginal peoples were forced off their traditional lands, sometimes at gunpoint.

I submit that Australia's native title system would look considerably more just if the Australian government adopted these UNDRIP principles into the framework of the NTA. After all, native title is 'a human rights issue.'[50] Other ways in which the UNDRIP may be relevant to Indigenous peoples' commercial interests on land held under native title will be discussed under the next heading.

[49] Lisa Strelein, *Compromised Jurisprudence – Native Title cases since Mabo* (Aboriginal Studies Press, 2006) 63.
[50] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) 295.

Whether native title can include interests of a commercial nature

I submit that native title should include interests of a commercial nature so as to redress the economic injustice currently experienced by native title holders. To construct native title in such a way that Aboriginal people do not reap the benefits of non-Aboriginal use of land is to keep many Aboriginal people living in impoverished conditions whilst others profit from the land of Aboriginal peoples. This is based upon an outdated Lockean conception of property[51] that has no place in modern society.

The construct of native title under Australian law perpetuates a racialised exclusion of Indigenous peoples from the benefits generally attached to property. The major rights typically associated with freehold property were set out in *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* and include 'the right to use or enjoy, the right to exclude others, and the right to alienate'.[52] In *Milirrpum* it was held that these rights were not present in Aboriginal peoples' relationship to land and that they therefore could not have title to property under the Australian legal system. Now under native title law Aboriginal people can enjoy some characteristics of property, but increasingly their rights are limited to a 'right to use and enjoy' rather than a 'right to exclude others', as seen in increased awards of non-exclusive possession in native title.[53] However, as Jon Altman explains, non-exclusive possession 'often provides a weak form of property right that needs to be shared with other interests, most commonly commercial rangeland pastoralism.'[54] In providing weak proprietary rights for native title holders, non-exclusive possession awards appear not to be consistent with the robust rights set out in the UNDRIP, for example, those set out in Article 2 enshrining a principle of non-discrimination. It is discriminatory for the Australian government to construct Aboriginal property interests as those which must always be shared with non-Aboriginal interests. It is also discriminatory for the Australian government to construct Aboriginal property interests as those which can be extinguished with ease whilst other non-Aboriginal interests, such as mining magnates, are given more robust protection by the government.

The rights acknowledged regarding native title for Aboriginal peoples have been modest indeed, and, as Noel Pearson stated after *Mabo v Queensland (No 2)*,[55] native title 'will give rights to only a very small percentage of the Indigenous population of this country.'[56] The rights attaching to native title were also defined diminutively by the High Court in *Western Australia v Ward* as a 'bundle of rights'.[57] This shows the capacity for judicial interpretation to leave such rights precariously

[51] Locke considered that property rights were intricately connected with the labour of individuals. Poh-Ling Tan, Eileen Webb and David Wright, *Land Law* (Butterworths, 2nd ed, 2002) 2.
[52] *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141, 272 (The Gove Land Rights case). Note that it is not the intention of this submission to suggest alienation of native title – as this could create intergenerational inequities for Indigenous peoples.
[53] Jon Altman, 'The political ecology and political economy of the Indigenous land titling 'revolution' in Australia' (2014) *Māori Law Review* Figure 2 <http://maorilawreview.co.nz/2014/03/the-political-ecology-and-political-economy-of-the-indigenous-land-revolution-in-australia/>.
[54] Jon Altman, 'The political ecology and political economy of the Indigenous land titling 'revolution' in Australia' (2014) *Māori Law Review* near Figure 2 <http://maorilawreview.co.nz/2014/03/the-political-ecology-and-political-economy-of-the-indigenous-land-revolution-in-australia/>.
[55] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[56] Noel Pearson, 'From Remnant Title to Social Justice' in Goot M and Rowse T (eds), *Make a Better Offer* (1994) 179 in Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) 291.
[57] *Western Australia v Ward* (2002) 213 CLR 1, [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

situated, open to systematic elimination by the state if at some point any of the said rights are seen as inconvenient by government. As Justice McHugh stated in *Ward*, the 'deck is stacked against the native title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict'.[58] This is certainly the case where there has been a grant by the government of either a fee simple estate or a leasehold interest that resembles a fee simple estate.[59] Although the High Court has recently recognised that native title can include commercial rights in fisheries,[60] these rights are non-exclusive, and it is uncertain at this point whether such commercial rights are confined to the Torres Strait. Yet '[c]ommercial fishing rights are essential to the Indigenous people of Australia, not only because they are traditional rights but because they are integral to the economic development of Indigenous communities'.[61]

The racialised exclusion of Indigenous peoples from the benefits generally attached to property and the systematic subordination of native title makes Australia a 'racial state' by David Goldberg's definition. Goldberg explains that:

> The racial state is racial not *merely* or reductively because of the racial composition of its personnel or the racial implications of its policies – though clearly both play a part. States are racial more deeply because of the structural position they occupy in producing and reproducing, constituting and effecting racially shaped spaces and places, groups and events, life worlds and possibilities, accesses and restrictions, inclusions and exclusions, conceptions and modes of representation. They are *racial*, in short, in virtue of their modes of population definition, determination and structuration. And they are *racist* to the extent that such definition, determination and structuration operate to exclude or privilege in or on racial terms, and in so far as they circulate in and reproduce a world whose meanings and effects are racist.[62]

It is therefore crucial as a matter of social justice that the state develop native title in accordance with the principles set out in the UNDRIP. Note though that social justice may well require the state to go beyond the UNDRIP, as it is a political compromise rather than a reflection of everything contained in the original Indigenous Draft Principles.[63] That said however, the following Articles of the UNDRIP may be relevant to Indigenous peoples' commercial interests on land held under native title:

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[58] *Western Australia v Ward* (2002) 213 CLR 1, 240-241 (McHugh J).
[59] *Wilson v Anderson* (2002) 213 CLR 401.
[60] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of* Australia [2013] HCA 33 (7 August 2013) [24] per French CJ and Crennan J; [74]-[75] per Hayne, Kiefel and Bell JJ.
[61] Mick Gooda quoted by the Australian Human Rights Commission, *Fishing rights affirmed for Torres Strait Islanders*, 7 August 2013 < http://www.humanrights.gov.au/news/stories/fishing-rights-affirmed-torres-strait-islanders>.
[62] David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 104.
[63] Particularly in regards to the content of the right to self-determination in Article 3. For the difference between Article 3 of the UNDRIP and the more robust rights set out in the Declaration of Principles (Indigenous Draft Principles) see Sharon Venne, 'The Road to the United Nations and Rights of Indigenous Peoples' (2011) 20(3) *Griffith Law Review* 557, 568-570; Ward Churchill, 'A Travesty of a Mockery of a Sham – Colonialism as "Self-determination" in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20(3) *Griffith Law Review* 526, 538. Some Indigenous people have conceptualized self-determination more broadly than the political 'compromise' contained in Article 3, for example, Michael Mansell states that '[s]elf-determination gives Aboriginal people the right to determine our own destiny.' Michael Mansell, 'The Political Vulnerability of the Unrepresented', in Jon

> Article 3
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 20
> 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> Article 23
> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
>
> Article 29(1)
> Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

It is said that the 'UNDRIP treads new ground with its strong themes of empowerment and partnership'.[64] One model where these aspects of the UNDRIP may be implemented is in the context of Aboriginal people doing necessary conservation work on their traditional lands, as explained in *People on Country – Vital Landscapes – Indigenous Futures*.[65] Altman suggests that 'a different notion of development based on conservation'[66] is needed in order to accommodate actual work undertaken by some Aboriginal people in remote Australia. This appears to be related to both Articles 3 and 29(1) of the UNDRIP. It involves a different option for Aboriginal people living in remote areas to the current government policies of mainstreaming/assimilating Aboriginal peoples.[67] It also involves a different valuation

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Altman and Melinda Hinkson (eds), *Coercive Reconciliation*, (Arena Publications, 2007) 73, 80. Cf Marcia Langton, 'The shock of the new: A postcolonial dilemma in Australian anthropology' in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 91, 105, where Langton claims that self-determination is unhelpful, a 'failed concept … in the administration of Indigenous affairs'.

[64] Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247, 255.

[65] Jon Altman and Sean Kerins (eds), *People on Country – Vital Landscapes – Indigenous Futures* (Federation Press, 2012) 1-22.

[66] Jon Altman, 'People on Country as Alternative Development', in Jon Altman and Sean Kerins (eds), *People on Country – Vital Landscapes – Indigenous Futures* (Federation Press, 2012) 1, 6.

[67] Jon Altman, 'People on Country as Alternative Development', in Jon Altman and Sean Kerins (eds), *People on Country – Vital Landscapes – Indigenous Futures* (Federation Press, 2012) 1, 7; Jon Altman, 'Arguing the Intervention' (2013) 14 *Journal of Indigenous Policy* 1, 12, 18, 20, 23, 32, 34; Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians – Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal*

of land based activity than is often seen in the modernist paradigm. All too often what the state sees as '[p]rogress in the abstract' within a neoliberal framework amounts to 'domination in the concrete'[68] for Indigenous peoples. The neoliberal project of mainstreaming Aboriginal people has met with considerable resistance.[69] Aboriginal people should be able to determine their own futures as an integral aspect of their right to self-determination under Article 3 of the UNDRIP. This has specific implications for land rights and native title. As Helena Whall explains:

> Fundamental to the issue of self-determination is the right of Indigenous peoples to be consulted about all matters directly affecting them on the basis of their right to give or withhold their informed consent. Indigenous peoples are often marginalised by developments on their own lands and regularly suffer severe environmental, social and economic disruption from developments, which benefit others. Without effective control over proposed developments, native title and land rights remain meaningless.[70]

Australian governments have performed poorly in this area, yet, 'free prior and informed consent' is a hallmark of Article 19 of the UNDRIP, which provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

However, the NTA is far from embodying such a right. Indeed by virtue of Subdivision P of the NTA there is merely a 'right to negotiate' for Aboriginal people affected by a development proposal. The 'right to negotiate' is a paltry right when compared with Article 19 of the UNDRIP which clearly requires the consent of the Indigenous people upon whose land development is proposed. By contrast, s 36A of the NTA allows for a ministerial override of the negotiation process and an override of the wishes of Aboriginal people if there is no agreement within a specified time. As McRae and others explain:

> Once the time limit expired (typically six months from the original development notice), the process could shift to a compulsory arbitration, in the National Native Title Tribunal or an accredited State or Territory body. After a year, the government could impose its will if it wished, through a ministerial over-ride.[71]

522, 545; Shelley Bielefeld, 'Conditional Income Support under SEAM: Human Rights Compatibility Issues' (2013) 8(9) *Indigenous Law Bulletin* 17, 19; Shelley Bielefeld, 'The "Intervention" Legislation – "Just" Terms or "Reasonable" Injustice? – *Wurridjal v The Commonwealth of Australia*' (2010) 14(2) *Australian Indigenous Law Review* 2, 3, 5-6.

[68] Tom Nairn, *The Break-up of Britain: Crisis and Neo-Nationalism* (New Left Books, 1977) 33 quoted in David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 74.

[69] For an example of Indigenous peoples' resistance to neoliberal mainstreaming in the compulsory income management context see Shelley Bielefeld, 'Compulsory Income Management – Exploring Counter Narratives amidst Colonial Constructions of Vulnerability', Australasian Law Teachers Association Annual Conference: Law Teachers as Gatekeepers, Australian National University, 30 September 2013, 24-29.

[70] Helena Whall, 'Indigenous Self-determination in the Commonwealth of Nations' in Barbara Hocking (ed), *Unfinished Constitutional Business? Rethinking Indigenous Self-determination* (Aboriginal Studies Press, 2005) 1, 4.

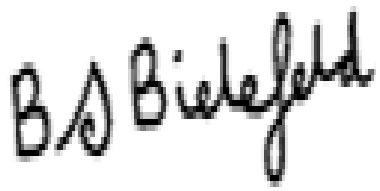
[71] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) 302-303.

Australia needs to do better than this if it is serious about developing policy in accordance with the UNDRIP. Goldberg notes that 'racial states' have frequently 'served capital's interests, more or less self-consciously',[72] and this routine privileging of industry interests over the interests of Indigenous peoples is reflected in the NTA. Despite the government's claim to be balancing the interests of industry with those of Indigenous peoples, the scales are heavily tilted in favour of industry interests. This is consistent with the critique of Goldberg who claims that 'racial states will intervene to secure the conditions for the reproduction of capital … by ordering resources and attempting to ameliorate tensions threatening the conditions for capitalism's expansion'.[73] Yet this reproduces racial inequality whilst the government simultaneously claims to be redressing it, and leaves Aboriginal peoples to bear the burden of Enlightenment notions of 'progress'.

Conclusion

I note that whilst some progress has been made with native title determinations in Australia,[74] the NTA is a long way from achieving the aims set out in its preamble. The NTA is far from rectifying the injustice Indigenous peoples have experienced through Australian colonisation. There is much that could be done to redress this, as outlined above.

Yours sincerely,



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[72] David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 101.
[73] David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 110.
[74] Jon Altman, 'The political ecology and political economy of the Indigenous land titling 'revolution' in Australia' (2014) *Māori Law Review* Figures 1 and 2 <http://maorilawreview.co.nz/2014/03/the-political-ecology-and-political-economy-of-the-indigenous-land-revolution-in-australia/>.